STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL MENZEL,

Plaintiff-Appellant,

v

LIGHT METALS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
August 15, 2000

No. 218614
Kent Circuit Court
LC No. 97-007733-NO

Before: Murphy, P.J., and Kelly and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's right hand was crushed when the press he was operating double cycled, and a safety device designed to pull the operator's hands out of the danger zone failed. Plaintiff's supervisor assigned him to operate the press notwithstanding the fact that for several days the press had been malfunctioning without warning, and competent repairs had not been attempted.

Plaintiff filed suit pursuant to MCL 418.131(1); MSA 17.237(131)(1), the intentional tort exception to the Worker's Disability Compensation Act, MCL 418.101 *et seq*.; MSA 17.237(101) *et seq*., alleging that defendant knew that the press would double cycle and cause injury, but required him to operate the press in spite of the knowledge that injury was certain to occur. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The trial court held a hearing and granted the motion pursuant to MCR 2.116(C)(10). The trial court found that while Leonard Visser, plaintiff's supervisor, had actual knowledge that the press had repeatedly malfunctioned, the facts did not support a conclusion that defendant had actual knowledge that an injury was certain to occur. In so finding, the trial court relied on evidence that Visser had operated the press himself, made some adjustments to it, and satisfied himself that it was functioning properly.

We review a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

MCL 418.131(1); MSA 17.237(131)(1) provides:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law.

To avoid the application of MCL 418.131(1); MSA 17.237(131)(1), there must be a deliberate act by the employer and a specific intent that there be an injury. A deliberate act may be one of omission or commission. Specific intent exists if the employer has a purpose to bring about certain consequences. *Travis v Dries & Krump Mfg Co*, 453 Mich 149, 169, 171; 551 NW2d 132 (1996). Specific intent is established if an employer had actual knowledge that an injury was certain to occur, and willfully disregarded that knowledge. An injury is certain to occur if there is no doubt that it will occur. An employer willfully disregards its knowledge of the danger when it disregards actual knowledge that an injury is certain to occur. *Id*., 174, 179. In order to show that an injury was certain to occur, a plaintiff must establish that the employer subjected him to a continuously operative dangerous condition that it knew would cause an injury. The evidence must show that the employer refrained from warning the plaintiff about the dangerous condition. *Id*., 178. Actual knowledge is required; constructive, implied, or imputed knowledge is insufficient. *McNees v Cedar Springs Stamping Co (After Remand)*, 219 Mich App 217, 224; 555 NW2d 481 (1996). An employer's knowledge of general risks is insufficient. *Agee v Ford Motor Co*, 208 Mich App 363, 366-367; 528 NW2d 768 (1995).

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We agree, reverse the trial court's decision, and remand for further proceedings. Plaintiff presented evidence, and the trial court found, that Visser had actual knowledge that the press had repeatedly malfunctioned by double cycling in the days preceding plaintiff's injury, and that the safety device designed to prevent crush injuries had failed. Visser did not seek to have the press repaired by the maintenance department. Rather, he ran the press for a few cycles, and decided that it was functioning properly. No evidence showed that Visser adjusted the press in a way that had proven successful in the past, as did the supervisor in *Travis*, *supra*. This case more closely resembles *Golec v Metal Exchange Corp*, 453 Mich 149; 551 NW2d 132 (1996) (the companion case to *Travis*, *supra*). In that case, the plaintiff was slightly injured when scrap metal he was loading into a furnace exploded. The plaintiff reported the incident and the cause thereof, the presence of aerosol cans and/or water in the scrap, but was told to return to his duties. No precautions were taken to prevent further explosions. Shortly thereafter, the plaintiff was severely burned when a large explosion occurred. In affirming in part and remanding for further proceedings, our Supreme Court stated that if the facts as alleged by the plaintiff were shown at trial, then plaintiff would have established the existence of a continually operative dangerous condition, in that every load of metal had the potential to explode, and would have established the existence of a genuine issue of fact as to whether the defendant had actual knowledge

that an injury was certain to occur. *Id*., 186. Here, if the facts alleged by plaintiff were proven at trial, plaintiff could establish the existence of a continually operative dangerous condition. The evidence showed that the press double cycled without warning, and then continued to do so until it was disconnected. The safety device also failed without warning. The laws of probability or the prior occurrence of a similar event does not constitute actual knowledge that an injury is certain to occur. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 149; 565 NW2d 868 (1997). However, in this case, with every press cycle plaintiff ran, the potential existed for the press to double cycle and for the safety device to fail. If both occurred, an injury was certain to occur. At a minimum, a genuine issue of fact existed as to whether defendant had actual knowledge that an injury was certain to occur, and willfully disregarded that knowledge by requiring plaintiff to operate the press. *Golec*, *supra*.

The trial court's order granting defendant's motion for summary disposition is reversed, and this case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Michael J. Talbot